

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHARON KELLY,)	
)	NO. CV-10-0312-LRS
Plaintiff,)	
)	ORDER DENYING DEFENDANT SAB'S
-vs-)	MOTION TO DISMISS
)	
SPOKANE AIRPORT BOARD dba)	
SPOKANE INTERNATIONAL AIRPORT,)	
and DALE OLSEN,)	
)	
Defendants.)	

BEFORE THE COURT is Defendant Spokane Airport Board's ("SAB") Motion to Dismiss, Ct. Rec. 6, filed on October 14, 2010 and argued on January 12, 2011. Aaron Rasmussen participated on behalf of the Plaintiff; Stephen Phillabaum participated on behalf of Defendant SAB. The Court having considered the oral and written argument of counsel, enters this order to supplement and memorialize the oral rulings of the Court.

I. BRIEF STATEMENT OF THE CASE

This is a §1983 and diversity case that arose when a Spokane Airport Police Department ("SAPD") officer, Dale Olsen, allegedly violated plaintiff Sharon Kelly's ("Plaintiff") constitutional rights by escalating a parking ticket situation in front of Terminal C at the Spokane International Airport ("SIA") into unreasonably stopping, seizing, using excessive force against, arresting, detaining in a holding cell, searching and criminally charging Plaintiff. Plaintiff's Complaint was filed on September 17, 2010. On October 14, 2010 SAB served a Motion to Dismiss on plaintiff. No scheduling conference has been held in this case and no discovery has been conducted while the motion has been pending. Plaintiff has filed a First Amended Complaint on November 4,

1 2010 pursuant to Fed.R.Civ.Proc. 15(a) without having the benefit of
2 discovery and based solely on her informal investigation.

3 **II. DISCUSSION**

4 **A. Defendant's Motion to Dismiss**

5 The Plaintiff alleges SAB d/b/a SIA and its SAPD violated her
6 established constitutional rights by: 1) Adopting a policy or adhering
7 to a custom that caused the alleged constitutional violations; 2) Being
8 deliberately indifferent to an obvious risk that persons, including
9 Plaintiff, would be subjected to constitutional violations by its
10 employee, Defendant Olsen; 3) An official of the SAB's SAPD with policy
11 making authority approving, acquiescing in, condoning and/or ratifying
12 the decision(s) and/or conduct that caused the constitutional violations;
13 4) Failing to adopt an effective policy, procedure and/or regulation to
14 prevent the constitutional violations including but not limited to
15 effective policies, rules and/or regulations regarding the constitutional
16 limits for stopping and seizing persons and/or using force against
17 persons under the circumstances especially while issuing parking tickets;
18 and 5) Failure to adequately hire, train and/or supervise their officers,
19 including but not limited to training and/or supervision relating to the
20 officers' stopping and/or seizing persons who are meeting airport
21 travelers and/or people in front of its terminal areas and/or using force
22 against such persons.

23 Defendant SAB asserts that Plaintiff's amended complaint must be
24 dismissed pursuant to Rule 12(b)(6) because of the failure of Plaintiff
25 to allege that Defendant Olsen knew of a "policy" or that such policy
26

1 induced him to act unconstitutionally. Defendant also states that
2 Plaintiff's claims are mere conclusions and devoid of facts.

3 Plaintiff argues that the Supreme Court in *Bell Atlantic Corp. v.*
4 *Twombly*, 550 U.S. 544, 570 (2007) and other courts applying the *Twombly*
5 standard have made it clear that: "... we do not require heightened fact
6 pleading of specifics, but only enough facts to state a claim to relief
7 that is plausible on its face." Further, Plaintiff asserts, the *Twombly*
8 and *Iqbal*¹ decisions do not preclude discovery. Plaintiff concludes
9 that, taken as a whole, the facts alleged in her 33 page original
10 complaint were sufficient to meet the *Twombly* pleading requirements.
11 Additionally, Plaintiff argues she has amended her Complaint to provide
12 additional specifics to further bolster her claims. While the Court
13 makes no finding concerning admissibility of these factual assertions,
14 they include: (1) detailed descriptions of Defendant Olsen's allegedly
15 unreasonable and unconstitutional conduct toward several people at SIA
16 over a 10- year time frame, some of whom complained to the SAPD; (2)
17 notice that an attorney was investigating §1983 claims against Officer
18 Olsen; and (3) a deputy prosecutor's recognition of Officer Olsen's
19 escalating parking ticket situations into wrongful stops, arrests and
20 charges before Plaintiff's arrest.

21 **B. Legal Standard - Motion to Dismiss**

22 A cause of action may be dismissed under Fed.R.Civ.P. 12(b)(6)
23 either when it asserts a legal theory that is not cognizable as a matter
24 of law, or if it fails to allege sufficient facts to support an otherwise
25 cognizable legal claim. *SmileCare Dental Group v. Delta Dental Plan of*

26 ¹*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

1 *California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). In addressing a Rule
2 12(b)(6) challenge the Court accepts all factual allegations in the
3 complaint as true (*Hospital Bldg. Co. v. Trustees of the Rex Hospital*,
4 425 U.S. 738, 740, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976)), and construes
5 the pleading in the light most favorable to the nonmoving party. *Tanner*
6 *v. Heise*, 879 F.2d 572, 576 (9th Cir.1989).

7 To survive a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a
8 complaint need only set forth a short and plain statement of the claim
9 showing the pleader is entitled to relief, and it "does not need detailed
10 factual allegations[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127
11 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007). A plaintiff must, however, set
12 forth "more than labels and conclusions, and a formulaic recitation of
13 the elements of a cause of action will not do[.]" *Id.* at 1965.
14 Allegations must indicate the pleader has a right to relief, and they
15 must rise above the level of mere speculation. *Id.* The pleading must at
16 least set forth factual grounds supporting a plausible basis on which
17 liability can be imposed, or it must set forth enough facts "to raise a
18 reasonable expectation that discovery will reveal evidence of" a basis
19 for liability. *Id.* Even if a court believes actual proof of the facts
20 alleged is improbable, or that recovery is remote or unlikely, a pleading
21 should still survive dismissal. *Id.*

22 Nonetheless, dismissal can be granted if there is a lack of a
23 cognizable legal theory or if there is an absence of sufficient facts
24 alleged under a cognizable legal theory. *Robertson v. Dean Witter*
25 *Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984). Even a liberal
26 interpretation of a civil rights complaint may not supply essential

1 elements of a claim that the plaintiff failed to plead initially. *Ivey*
2 *v. Board of Regents*, 673 F.2d 266, 268 (9th Cir.1982). Additionally, the
3 Court is not required to accept legal conclusions cast in the form of
4 factual allegations if those conclusions cannot reasonably be drawn from
5 the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55
6 (9th Cir.1994) (*citing Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct.
7 2932, 92 L.Ed.2d 209 (1986)).

8 **C. Analysis**

9 The Court denies Defendant's motion to dismiss pursuant to Rule
10 12(b)(6) based on Ninth Circuit case law. The Ninth Circuit has
11 consistently rejected the application of a heightened pleading standard
12 to a claim of municipality liability under § 1983, and the "plausibility"
13 standard in *Twombly* has not affected the federal courts' continued
14 rejection of a heightened standard. See *Young v. State of Hawaii*, 548
15 F.Supp.2d 1151, 1161 (D.Hawai'i 2008); *Crump v. The City and County of*
16 *San Francisco*, 2007 WL 2220938, *3 (N.D.Cal.2007). Instead, under the law
17 of the Ninth Circuit:

18 a claim of municipal liability under [§] 1983 is
19 sufficient to withstand a motion to dismiss even if
20 the claim is based on nothing more than a bare
allegation that the individual officers' conduct
conformed to official policy, custom, or practice.

21 *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir.2007) (*quoting Galbraith*
22 *v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir.2002)). The
23 district courts in the Ninth Circuit have applied the above-quoted
24 standard post-*Twombly*. See *Young*, 548 F.Supp.2d at 1161. Plaintiff has
25 pled numerous allegations relative to her claim of municipality liability
26 against Defendant SIA. Plaintiff alleges SAPD officer Dale Olsen violated

1 her various constitutional rights in the course of effecting Plaintiff's
2 arrest. Am. Compl. at ¶¶ 5.1-5.43. Plaintiff alleges SIA followed
3 policies or practices of failing to properly train, supervise, retain,
4 and/or control its police officers, and the policies or practices
5 permitted the violations of his rights to occur. Id. at ¶¶ 7.1-7.4.
6 Specifically, Plaintiff alleges SAB dba SIA failed to investigate and
7 impose punishment in prior situations where unlawful arrests occurred,
8 or where excessive force was used. Id. at ¶ 5.45-5.46. Allegations
9 suggesting that certain conduct was not an isolated incident can be
10 sufficient to demonstrate the existence of a custom, policy, or practice.
11 See *Crump*, 2007 WL 2220938, *3-4.

12 Plaintiff also alleges SIA followed policies of inaction or
13 acquiescence which resulted in a failure to protect Plaintiff's
14 constitutional rights. Am. Compl. at ¶ 7.2. SIA purportedly followed
15 policies, customs, or practices relative to the hiring, employment, and
16 retention of its police officers which amounted to indifference to the
17 rights of persons with whom the officers would come into contact. Id. at
18 ¶ 7.4. Additionally, Plaintiff alleges SIA was deliberately indifferent
19 to the need to train, supervise, and discipline its police officers
20 relative to their conduct in effecting an arrest, and using force. Id.
21 Finally, Plaintiff alleges a causal connection existed between SIA's
22 policies and the constitutional deprivations of which Plaintiff
23 complains. Id.

24 A municipality's failure to train or supervise its employees may
25 subject it to liability "where the failure to train 'amounts to
26 deliberate indifference to the rights of persons' with whom those

1 employees are likely to come into contact." *Lee v. City of Los Angeles*,
2 250 F.3d 668, 681 (9th Cir.2001) (quoting *City of Canton v. Harris*, 489
3 U.S. 378, 388-89, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)). Consistent
4 with the standard in *Twombly* such a claim will survive a motion to
5 dismiss as long as the claim contains both allegations of misconduct and
6 allegations of failure to train. *Atchison v. District of Columbia*, 73
7 F.3d 418, 423 (D.C.Cir.1996). Additionally, the notice pleading standard
8 of *Leatherman*² requires nothing more. *Id.* Allegations demonstrating the
9 existence of a custom, policy or practice, together with allegations that
10 the custom, policy or practice was the "moving force" behind the alleged
11 constitutional violations are sufficient to survive a motion to dismiss.
12 *Crump*, 2007 WL 2220938, *3-4.

13 Taking all of Plaintiff's allegations together, the Court finds
14 Plaintiff has sufficiently pleaded a claim of municipality liability
15 against SIA. Plaintiff has gone beyond the minimal "bare allegations"
16 standard followed by the Ninth Circuit. Plaintiff has alleged Defendant
17 Olsen deprived Plaintiff of certain constitutional rights, that Defendant
18 SIA had a policy which amounts to deliberate indifference to Plaintiff's
19 and others' constitutional rights, that the Defendants acted pursuant to
20 such policy, and that the policy was the moving force behind the
21 constitutional violations. Plaintiff has plausibly alleged facts which
22 suggest but do not prove that the Defendants may have legal liability
23 herein. However, without basic discovery, Plaintiff cannot reasonably
24 be expected to go further at this time. Plaintiff is not required at

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26 ²*Leatherman v. Tarrant County Narcotics Intelligence and*
Coordination Unit, 507 U.S. 164, 168 (1993) (rejecting heightened
pleading standard for § 1983 suits asserting municipal liability).

1 this stage in the litigation to state with any extra specificity the
2 nature and extent of this de facto policy by Defendant. Defendant SIA's
3 motion to dismiss should be denied in this respect.

4 **IT IS ORDERED** that Defendant Spokane Airport Board's Motion to
5 Dismiss, **Ct. Rec. 6**, filed on October 14, 2010 is **DENIED** for the
6 reasons stated above and at the hearing.

7 **IT IS SO ORDERED.** The District Court Executive is directed to
8 enter this order.

9 DATED this 20th day of January, 2011.

10 ***s/Lonny R. Suko***

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12 LONNY R. SUKO
13 CHIEF UNITED STATES DISTRICT JUDGE
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